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No. 45.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

FEDERAL POWER COMMISSION,
*Petitioner,*

*v.*

COLORADO INTERSTATE GAS COMPANY,
*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR COLORADO INTERSTATE GAS COMPANY.

JAMES LAWRENCE WHITE,
WILLIAM A. DOUGHERTY,
30 Rockefeller Plaza,
New York 20, New York;

JOHN P. AKOLT, SR.,
JOHN R. TURNQUIST,
1300 Telephone Building,
Denver 2, Colorado;

CHARLES E. MCGEE,
1729 H Street, N. W.,
Washington 6, D. C.

LEWIS M. POE,
P. O. Box 1987,
Colorado Springs, Colorado;

*Counsel for Colorado Interstate Gas Company*

November, 1954

> tion in the cost of service of the $421,537. To accede to Colorado's contention, however, is to nullify the removal of the $421,537 from the costs which the customers of Colorado should bear. For under Colorado's claim the $421,537 denied it as recovery of a loss on gasoline operations would be recovered in substantial part from the customers in the guise of a reimbursement for a higher tax liability only part of which would in fact be incurred" (R. 127-128).

Colorado filed its petition to review in the court below. *Inter alia*, it was alleged that the Commission should not have made any deduction for alleged loss in gasoline operations. Also, it was asserted that in any event the calculated tax credit amounted to a confiscatory reduction in the rate of return (R. 7).

The court below decided that the elimination of the gasoline loss was wrong. In so deciding the court stated:

> "It would seem that the elimination of the loss of the gasoline operations from the cost of service deprives Colorado of earning the fair rate of return to which it is entitled. It means that this loss must come out of the net profits of the stockholders notwithstanding that it is an element of cost of service. Nor is it an answer to say that this was a condition of the merger order and that, therefore, Colorado's stockholders are bound and saddled with this loss. We are dealing here with a business affected with a public interest. Parties in such businesses are not free to contract as they choose. They are subject to regulation by proper Governmental authority. In the exercise of its jurisdiction, such authority must be fair, both to the public and to the utility. It is the statutory duty of the Commission to establish on the one hand rates that are fair and just to the utility and on the other hand to strike down rates that

> demand an unlawful and unreasonable exaction. A rate based upon the exclusion from the cost of service, no matter for what reason, of a substantial amount of admitted operative cost does not and cannot reach a just end result and may, therefore, not stand.
>
> "The provision in the merger order that such operative costs as we are considering here should be eliminated from the cost of service base in subsequent rate hearings does not alter these basic principles. When that proceeding was before the Commission, it was its statutory duty to determine whether the plan was fair and just to Colorado's gas users. If it found that it might result in an unjust burden on them, it had power to disapprove it. It could not predicate its approval thereof upon a condition which it could not adopt in a rate hearing and which would thereafter deprive Colorado of the opportunity to earn a fair return upon its 'investment'" (R. 271, 209 F. 2d 727).

The court then recognized that this would require further consideration of the income tax allowance (R. 277).

Upon rehearing, the court below noted that Colorado had objected to the exclusion of the calculated loss on gasoline operations, although the objection was not placed upon the legal ground used by that court (R. 300). Aside from that, the court concluded that it could correct manifest error which deprived Colorado of a fair return (*id.*). The court also premised its conclusions upon its obligation to examine the "end result" and upon its expanded review responsibility under Section 10 of the Administrative Procedure Act.

## Summary of Argument.

The issue here relates only to the authority of the Court of Appeals to deal with the question of reducing the rate of return. That authority may be sustained by any meritorious ground. *Marshall* v. *Pletz*, 317 U. S. 383 (1943).

I. The record facts show that the issue was raised in the rate proceeding, both as to the calculated loss and the associated income tax credit. As to the former (making up $421,537 of the deduction) Colorado objected before the Commission and in the court below to the method used and asserted a lack of substantial evidence to support that deduction. On the latter, the tax credit ($456,665), specific objection was made that this amounted to a reduction in the rate of return—the ground used by the court below in reversing. Clear reference was made to the Commission and to the court that the effect of the Commission's treatment of a tax credit flowing from the gasoline loss reduced the return which the Commission found reasonable and purported to allow. This the Commission recognized.

Upon rehearing, the Commission decided that the point on reducing the rate of return was not well taken, not because that was not the result, but because the calculated loss required this greater deduction. The Commission considered the two deductions to be required under the merger condition and dealt with them as parts of a whole.

The Commission was therefore apprised that a reduction in return would be challenged. By the Commission's own action both the loss and tax credit were treated as the same so far as the propriety of making the deduction was concerned. It was apprised, therefore, of the issue upon which the court below acted. *May Department Stores Company* v. *National Labor Relations Board*, 326 U. S. 376 (1945).

II. If the question was not before the Court of Appeals, then the peculiar facts excuse the failure to raise the question.

The Commission had the question of the enforceability of the condition very forcibly brought to its attention in the previous interrelated certificate case. The Commission's own counsel and a dissenting Commissioner stated their doubts as to the condition's validity. The Commission acted with this knowledge in mind.

This previous assertion of possible invalidity satisfies the policy of statutes such as the Natural Gas Act which limit review to objections raised. This policy is that an agency should have the opportunity to consider the matter and make its decision. *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 155 (1946). Here the Commission had that opportunity in the certificate proceedings.

Also, the matter of reducing a reasonable rate of return involves a fundamental right. Since Colorado's business is affected with a public interest it cannot, by agreement to the condition, prejudice either consumer or investor interests. Being a fundamental and not merely a personal right involved, there was no effective waiver of a reasonable rate of return. See *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952).

III. The court below did not in any way interfere with the Commission's administrative function. The Commission claims that the court did so because it left the merger stand without the condition. This certainly is not true for the Court of Appeals gave no direction to the Commission on the certificate nor can any such direction be implied. It merely laid bare the Commission's error of law and instructed that its opinion should be followed in the rate

determination. The Commission is unfettered by any judicial requirement so far as the certificate is concerned. This is fully consistent with a court's authority upon review. *Federal Power Commission* v. *Idaho Power Company*, 344 U. S. 17, 20 (1952).

The court below dealt with the legal question: can a proper rate of return be reduced under the aegis of a condition to a certificate? There has been no interference with the Commission's factual expertise.

The rate condition of the certificate order was by its terms only contingently effective, and in any event was not *res judicata*. There could have been no review at that time, and subsequent review cannot be denied on the basis of collateral attack. The lack of review of the condition at that time, therefore, is immaterial.

IV. The court below recognized a greater responsibility upon review by virtue of Section 10 of the Administrative Procedure Act. The Commission denies this expanded responsibility and contends that Section 19(b) of the Natural Gas Act, standing alone, is what controls; but its reasons for arguing that Section 10 should be ignored are unsound. In particular, the introductory clause of Section 10 of the Administrative Procedure Act denying review where "statutes preclude judicial review" does not apply to where review is limited, as the Commission contends, but only to where any review is denied.

The court below properly discharged its responsibility upon review and in support of its action properly recognized its power under all of the law—including its broadened responsibility under that remedial legislation.

## ARGUMENT.

The only issue here is whether the Court of Appeals *could* consider the question—not whether it made a proper determination. The Commission in stating the "Question Presented" (Com. Brf. pp. 2-3)[9] unduly narrows the inquiry. The question as presented by the Commission is limited to whether Section 10(e) of the Administrative Procedure Act empowered the court below to reverse under the circumstances of this case. The basic assumption of the Commission is that the court below depended in the main, at least, upon that statutory provision.

The inquiry here is broader. At this juncture, the judgment may be supported by any meritorious ground whether or not urged below. *Marshall* v. *Pletz*, 317 U. S. 383, 390 (1943); *United States* v. *Ballard*, 322 U. S. 78, 88 (1944).

### I.

### Upon the whole record, and under the peculiar facts of this case, the question was before the Court of Appeals.

The record facts show that the Commission made two important deductions based on a calculated loss on account of the gasoline operations. *First*, there was the deduction of $421,537 on the calculated loss itself (R. 79). *Second*, there was an additional $456,665 deducted from the cost of Colorado's service on account of an alleged credit to Colorado's Federal income taxes on account of that loss (R. 127-128).

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[9] The reference "(Com. Brf. p.....)" will be used in citing Commission's Brief on the merits.

Colorado objected to both of these deductions before the Commission and in its petition for review to the court below.

## A. It was objected by Colorado that no loss should be calculated or deducted.

### 1. The $421,537—Objections to Method etc.

The Commission concedes that Colorado contended that no loss should be found on the gasoline operations—that there was a net profit, not a loss (Com. Brf. pp. 15-16).[18] While Colorado did not challenge the legal propriety of deducting the calculated loss on this specific amount of $421,537, there can be no doubt whatsoever that it did contend that the deduction was improper under the Commission's calculation or allocation method. Objections went to contentions in regard to the method, the failure to use the appropriate factors under the adopted method, the lack of substantial evidence to sustain the conclusion that there was a loss, and to the contention that the method adopted violated the certificate condition (R. 98-103, 106-114). Similar contentions were made in the court below (R. 7).

It is clear, therefore, that there was submitted to the Commission, and to the Court of Appeals, the contention that no calculated loss should be deducted. That fact cannot be denied, nor is it denied.

### 2. The $456,665—Objection that allowed rate of return was reduced.

On the calculated so-called Federal income tax credit in the amount of $456,665, Colorado specifically objected

[18] The Commission argues here that "Colorado conceded, that the gasoline operation loss, if properly determined, should be excluded" (Com. Brf. p. 16). Without intending to engage in semantics, Colorado submits that the fairer construction of the record is that the propriety of the deduction was assumed. Colorado certainly felt that the allocation of the costs was erroneous. The Commission Brief makes that clear (Com. Brf., pp. 15-17).

before the Commission that this, alone, had the effect of reducing the rate of return.

Colorado demonstrated by mathematical calculation that this was so (R. 112-114). Colorado also showed that it had been the Commission's uniform policy to allow Federal income tax as a part of the cost of service associated with the rate of return.[11] This, however, was not done in regard to Colorado (*Id.*). The record leaves no doubt of this fact.

The Commission recognized that this point was made when it stated Colorado alleges that it has been deprived of the rate of return to which it is entitled by reason of our treatment of the loss on gasoline operations in computing income taxes (R. 127).

Admittedly, therefore, the Commission had before it (R. 127), and the court below had before it (R. 7) an objection that the Commission's treatment to this extent amounted to a reduction of the rate of return.

### B. The Commission fused the questions of calculated loss and income tax credit as being one and the same.

After Colorado applied to the Commission for rehearing of the rate reduction order, the Commission issued a short opinion (R. 118-130). In this opinion, dealing with the objections raised in an application for rehearing filed pursuant to Section 19 of the Natural Gas Act, the Commission considered the calculated gasoline operation loss and a calculated associated tax saving as being parts of a whole.

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[11] The Commission has stated this policy (Re *Transcontinental Gas Pipe Line Corporation*, 94 PUR (NS) 333 at 351 (1952)):

> "It has been our consistent practice to allow in the Cost of Service, the amount of Federal income taxes which the utility would actually pay to the Government based upon a fair return, adjusted for all tax credits to which the corporation is entitled" (R. 112).

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## BRIEF FOR COLORADO INTERSTATE GAS COMPANY.

### Opinions Below.

The original opinion of the Court of Appeals (R. 262-279) is reported at 209 F. 2d 717; its opinion on rehearing (R. 299-302) is reported at 209 F. 2d 732. The opinion and order of the Federal Power Commission reducing rates (R. 47-97) are reported at 95 PUR (NS) 97.[1]

[1] The Commission's opinion and order approving the merger of the properties and facilities of Colorado Interstate Gas Company with those of Canadian River Gas Company (R. 243-261) are reported at 10 F. P. C. 105 *et seq.*

This fusion is clear. The Commission first recognized Colorado's objection that the tax treatment amounted to a reduction in the rate of return. It next stated that the difference between the claimed tax liability and the income tax allowed resulted from the treatment of the calculated loss on gasoline operations. Then the Commission concluded that "To accede to Colorado's contention, however, is to nullify the removal of the $421,537 from the costs which the customers of Colorado should bear" (R. 127-128). The Commission did not deny, nor does it now deny, that the effect of its treatment did reduce the return.

The Commission therefore considered the loss which it calculated, and the associated calculated tax saving as being parts of a whole deduction. It admitted that Colorado objected to the greater part of this whole as being an improper deduction from the rate of return. It then went further and stated that to satisfy Colorado's objection would nullify the whole.[12]

The clear conclusion was that the Commission felt there was presented an objection to a deduction from return on account of the gasoline operations. The Commission dealt with the problem on that basis.

### C. The Commission was apprised that a contention would be made on a reduction of return because of the gasoline deduction.

#### 1. Notice to the Commission.

The Commission deals with this point in the comparative obscurity of a footnote (Com. Brf., p. 17, note 6).

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[12] True, the Commission stated "We have found that the loss on gasoline operations should not be considered a part of the cost of service and with this finding Colorado does not take issue" (R. 127). Of course, Colorado did take issue, as the cited record shows. This statement, however, does not vary the conclusion that the calculated loss and the assumed tax deduction were inseparable parts of one whole item.

## Jurisdiction.

The original judgment of the Court of Appeals was entered on October 29, 1953 (R. 279). Pursuant to the Federal Power Commission's timely petition for rehearing, the Court of Appeals on December 8, 1953 vacated its original judgment and granted rehearing (R. 290). The judgment on rehearing was entered on January 25, 1954 (R. 302). The petition for a writ of certiorari was filed on April 23, 1954, and granted on June 7, 1954 (R. 327). 347 U. S. 1009. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1), and Section 19(b) of the Natural Gas Act (15 U. S. C. §717r(b)).

## Question Presented.

Whether, in a review of a rate reduction order entered under the Natural Gas Act, the court below was foreclosed from considering the validity of a contingent rate condition, imposed in granting a certificate of convenience and necessity, (which had the effect in the instant case of reducing the rate of return by excluding certain expenses in determining the rates ordered by the Commission), when (i) in such previous certificate proceeding the invalidity of that condition was urged before and considered by the Commission, and (ii) when the Company on asking for rehearing of the instant rate order, and in its petition for review objected to the deduction on two bases:

> First, that no deduction should be made because the method of calculating the expenses was not supported by substantial evidence; and,
>
> Second, that an associated deduction made by the Commission from allowed income taxes amounted to a confiscatory reduction of the rate of return; particu-

There can be no doubt that Colorado's contention in relation to an unwarranted reduction of the purported rate of return allowance was serious. Colorado presented to the Commission a clear mathematical calculation based upon record facts to show that its return was being reduced below what the Commission claimed to allow. This calculation and the associated discussion of the claimed error occupies more than one and one-half pages of the printed record here (R. 112-114) and is the subject of the treatment of a specification of error which noted that the Commission's action reduced the rate of return below the 5¾% found to be reasonable (R. 103).

The Commission, however, declares that this did not apprise it that the validity of the merger condition was being challenged (Com. Brf., p. 17, note 6). Colorado submits that the facts did apprise the Commission. Colorado, after describing the error and showing its departure from valid regulatory practice, said "The action of the Commission in this regard, therefore, is arbitrary, capricious, discriminatory and highly prejudicial to Colorado" (R. 113-114).

Bearing in mind that the Commission is not here seriously challenging the correctness of the determination below (and under the question as presented, could not do so), it is appropriate to analyze exactly what the court below did. Basically, it was held that the gasoline elimination deprived Colorado of "earning the fair rate of return to which it is entitled" (R. 271). This is exactly the point Colorado raised in discussing the associated tax credit. The Commission considered the gasoline loss and the tax credit as parts making up the whole of the deduction from return.

larly when the Commission considered both deductions to involve the same principle.

## Statutes Involved.

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. §717 *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001 *et seq.*, are set forth in the Appendix, *infra*, pp. 38-39.

## Statement.

The question before the Court arises out of two proceedings before the Commission which turned out to be interrelated.

In the first, the Commission in 1948 instituted a rate investigation against Colorado Interstate Gas Company[2] under Section 5(a) of the Natural Gas Act (R. 9-11). Hearings on this started October 1, 1951 (R. 11). Between the institution of the investigation and the beginning of hearings therein, the second proceeding arose and was determined.

The second proceeding involved an application filed early in 1950 under Section 7 of the Natural Gas Act by Colorado for a certificate of public convenience and necessity to construct necessary facilities to satisfy public demands and to drill wells at a total estimated cost of $13,500,000. Colorado estimated that it could not finance this necessary work without a merger with Canadian River Gas Company whose stock was 100% held by Southwestern Development Company. Canadian River was a producer of natural gas and sold large quantities to Colo-

[2] Colorado Interstate Gas Company will be referred to as "Colorado", and The Federal Power Commission as "Commission".

**2. The law does not support the Commission.**

The case authority cited by the Commission to support its position fails to do so in the light of these facts (Com. Brf., pp. 18-19). The Commission likens the restriction of Section 19(b) of the Natural Gas Act to Section 10(e) of the Labor Management Relations Act (formerly Section 10(e) of the National Labor Relations Act). The Labor Act would appear to have a stronger restriction—that Act excuses failure to raise an objection only "because of extraordinary circumstances * * *." The Natural Gas Act excuses failure where there is "reasonable ground for failure so to do * * *" In any event the cases cited by the Commission do not support the proposition that the requirements of Section 19(b) were not met by Colorado's objections. In fact one of the cases cited supports Colorado. The others, by their facts, are distinguishable.

In fact one of the cases cited supports Colorado. The others, by their facts, are distinguishable.

In *May Department Stores Company* v. *National Labor Relations Board*, 326 U. S. 376 (1945) this Court applied the test of whether an "* * * objection was sufficiently specific to apprise the Board of the question now presented * * *" in order to determine the power of the lower court to consider it (326 U. S. at 386, note 5). This Court concluded there that the peculiar circumstances coupled with an objection to an Examiner's intermediate report claiming the same not to be "supported or justified by the record" was sufficient to apprise the Board of the point there involved. Sufficiency of apprisal is, therefore, the test. In the *May Department Stores* case, this Court noted that the objection fell short of desirable specificity but deemed it sufficient in that case. Under the circumstances of this case, like the *May Department Stores* case, the peculiar circumstances cure any lack. Here, there was objection to a

rado. Southwestern had valuable tax advantages arising from its ownership of Canadian stock but would transfer the same to effect the merger in consideration of receiving rights in natural gasoline.[3] Colorado was, in the main, to process the gas and deliver it to Southwestern, and the latter was to give Colorado 50% of gross revenues for performing the production, gathering and extraction functions. Canadian River was a party to this certificate proceeding since the case involved operations of Canadian River over which the Commission had jurisdiction (R. 243-261).

Under Commission rate-making policies then in effect, the revenue which Colorado would have derived from the sale of natural gasoline (or which Canadian River would derive) would have been a credit to operating costs and thus have an effect on reducing rates.[4]

The transfer of the natural gasoline therefore posed a problem. While the Commission felt that there was a good chance that, through the merger, Colorado would realize almost as much in the way of tax benefits as would be given up through the transfer of natural gasoline (R. 252-253), yet some participants felt that the natural gasoline transfer would adversely affect rate payers. A representative of the City and County of Denver, Colorado (an intervener in the certificate case), therefore suggested as a condition to the certificate, an accounting procedure to remove the concern that rate payers would suffer (R. 322-325). Colorado counter-suggested that if the loss through

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[3] This is a generic name applied to certain extractable liquid hydro-carbon fractions which raw natural gas contains in some areas. The product is in demand and is, therefore, a valuable natural gas constituent.

[4] This policy was explained but changed in *Panhandle Eastern Pipeline Company*, 3 P. U. R. 3d 396, 422-424 (1954). The Commission now credits such revenues only if and to the extent that such extraction is necessary to the preparation of the gas for interstate transportation.

reduction in the rate of return because of the treatment of the gasoline operations question. By the Commission's own treatment, the two deductions made from the return were dealt with as concommitant things. The Commission clearly knew, therefore, at the time the objections were made in the application before it for rehearing, what would have to be faced upon review. As in *May Department Stores*, the Commission had made all the findings necessary to permit the reviewing court to deal with the issue.

The other two cases cited (*Marshall Field & Company* v. *National Labor Relations Board*, 318 U. S. 253 (1943); and *National Labor Relations Board* v. *Seven-Up Bottling Company*, 344 U. S. 244 (1953)) exemplify the proposition that very broad objections which do not apprise an agency of fundamental contentions are not sufficient. The circumstances here show apprisal.

Having faced up to the situation, having overruled Colorado's objection that the rate of return was being improperly reduced, the Commission cannot now claim lack of apprisal to mend its error in reducing the rate of return it found to be proper.

## II.

### There were reasonable grounds to excuse the failure to raise the question.

Assuming at this point that an apprising objection had not been made, Colorado contends that there is reasonable ground for failure to raise the objection and thus the limitation of Section 19(b) does not apply.

#### A. The Commission already had considered the issue.

Without doubt, the Commission considered the certificate case and the rate case to be interrelated. This is evidenced

the gasoline function exceeded the additional revenues retained because of the tax savings, the net loss would not be charged to the rate payers (R. 325).

The Commission sat *en banc* to hear oral argument on this certificate case and the question again arose as to attaching a condition to the certificate on the gasoline question. The Commission's counsel stated that Colorado's Board could not bind the stockholders to absorb any loss through the gasoline operations over and above what Colorado would receive. One of the Commissioners (of the majority in issuing the certificate) agreed in the course of the oral argument that there would be confiscation if the return got as low as 4% and such condition would not be binding (R. 311-312, note).

Nevertheless, a condition was proposed by Colorado in specific terms related to the Commission's Code of Accounts and specifying that if expenses exceeded revenue, the loss would not be part of the cost of service.[5]

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[5] The proposal was as follows (R. 289-290):

> "If, as a result of carrying out the terms and conditions in the transaction proposed as a part of the merger of Canadian River into Colorado Interstate whereby rights to liquid hydrocarbons in place are granted to Southwestern Development Company and whereby Colorado Interstate is to receive 50% of the gross proceeds from the sale of certain liquid hydrocarbons and 15% of the net revenue to be received by Colorado Interstate from the operation of the Fritch Natural Gasoline Plant of Texoma Natural Gas Company, the amounts chargeable as Residuals Operation Expenses (Account 747.2) and Residuals Maintenance Expenses (Account 747.3) exceed the amounts to be paid to Colorado Interstate pursuant to said transaction which is accounted for as Residuals Produced (Account 747.1) and Revenue from Processing Natural Gas (Account 617) then and in that case in any proceeding in which the effective or proposed rates of Colorado Interstate are under inquiry the amount by which said expenses exceed the amount so received and accounted for as Residuals Produced and Revenue from Processing Natural Gas shall not be considered as a cost of service."

not only by the fact of the rate condition relating to natural gasoline included in the order granting a certificate, but also by another fact. The Commission majority in its certificate case opinion stated that with the conclusion of the certificate matter, future operations were settled and that, therefore, the rate case should move to a speedy conclusion.[13]

The record shows that the Commission had been confronted by its own counsel with an argument that a certificate condition such as that involved here would not be valid and could be confiscatory (see *supra* p. 5). Also, the dissenting Commissioner raised this very point (R. 311-312, note 10 F. P. C. 133). Given these facts, what would it have availed Colorado to urge before the Commission that the condition was confiscatory *per se* and should not apply?[14]

**B. This previous consideration satisfied the policy of Section 19(b).**

The facts of this case are most peculiar when one considers the interrelation of the certificate proceedings and

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[13] The Commission's exact words were (R. 255-256, 10 F. P. C. 118):

> "Now that the acquisition by Colorado of the Canadian properties has been authorized and the future pattern of operation settled, it is appropriate that our rate investigation should be brought to a speedy conclusion. In our order issued March 1, 1951, we required Colorado, within four months of that date, to report to us the completion of the acquisition, the commencement of operation by it of facilities acquired, and proof of dissolution of Canadian. Therefore, we have, by order entered today, fixed the date of hearing in the rate case for August 1, 1951, which is one month after the required [d]ate for such report."

This August 1, 1951 date was subsequently changed to October 1, 1951 because the mechanics of the merger were not accomplished as speedily as anticipated.

[14] This raises the additional point that the law does not require the doing of a useless act. This has been true from Coke's time. See *Williston on Contracts* (rev. ed. 1936) §698A; *Restatement of*

A majority of the Commission decided the certificate should issue and stated (10 F. P. C. 118-119):

> "A summary of the salient conclusions justified by the facts appearing on this record will demonstrate succinctly the desirability of the project laid before us for judgment:
>
> "(1) The merger can be reasonably expected to cost Colorado no more than $3,762,713 spread over a 23-year period and may result in a cash benefit to it over the same period of $4,376,495.
>
> "(2) Colorado will acquire legal title to physical assets, the original cost of which, after depreciation, is $10,979,522. These include natural gas reserves containing some 3 trillion cubic feet of gas which is expected to be adequate to supply the needs of the gas consumers in the Rocky Mountain area for at least 20 years at a low cost.
>
> "(3) Colorado will gain valuable reversionary rights in the physical assets mentioned above which, but for the merger, would have matured to the benefit of Southwestern rather than Colorado, probably by 1972.
>
> "(4) The corporate structure of the Texas-to-Denver pipeline will be greatly simplified with resulting savings.
>
> "(5) There will be created through the merger a financially sound natural gas company able to finance present and future expansions to meet the needs of the gas consumers dependent upon its system.
>
> "(6) The imperative need for large additional deliveries of natural gas to meet the requirements of the Rocky Mountain area, primarily those of domestic customers, will be satisfied without further unnecessary delay without any increase in present rates to the consumer.

> "These, then, are the principal reasons which lead us to issue our certificate order of March 1, 1951. Viewing dispassionately all of the evidence in this case, we think that denial of the application would have been a distinct disservice to the public" (R. 318-319).

The majority then imposed the condition which prompted reversal by the Court below.[6] This condition provided (10 F. P. C. 780):

> "* * * if, as a result of carrying out the terms and conditions in the transaction proposed as a part of the acquisition and merger of Canadian into Colorado whereby rights to liquid hydrocarbons in place are granted to Southwestern Development Company and whereby Colorado is to receive 50% of the gross proceeds from the sale of certain liquid hydrocarbons and 15% of the net revenues to be received by Colorado from the hydrocarbons resulting from the operation of Fritch Natural Gasoline Plant of Texoma Natural Gas Company, the costs properly allocable to such hydrocarbons exceed the amounts payable to Colorado pursuant to such transaction, then and in that case in any proceeding in which the effective or proposed rates of Colorado are under inquiry such excess shall not be considered as a cost of service to Colorado's natural gas customers and consumers" (R. 269).

One Commissioner dissented on the granting of the certificate and, *inter alia*, objected that the condition sought

[6] In addition to the condition on gasoline operations the Commission imposed a further rate condition in this certificate proceeding providing as follows:

> "Colorado shall tender to all of its resale customers service agreements in which Colorado will agree * * * that it will not propose any increase in any rate subject to the jurisdiction of the Commission which will be attributable in whole or in part to the acquisition and merger authorized herein."

by the execution of the certificate condition. That court also recognized that in view of this public interest, natural-gas companies are not free to commit themselves in any unfettered fashion (R. 271). Colorado's action in regard to the condition therefore was immaterial.

Any obligation of a consensual nature has imported into it the overriding public policy of protecting both the public and the investor. This is the scheme of the Natural Gas Act which provides for the changing of a contract by Commission order. Under Section 5(a) it is expressly provided that the Commission, after hearing, "shall determine the just and reasonable rate * * *, or contract to be thereafter observed and in force, and shall fix the same by order * * *" *Cf. Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, 228 (1899); *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467 (1911). But also the obligation of the Commission under the Act is to allow rates which in result are just and reasonable regardless of contract or other commitment. The process involves "a balancing of the investor and the consumer interests". *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 602-603 (1944). The provisions of the Act, and not a party's consent to waive these provisions, control.

This brings up the point of waiver or acquiescence. In the first place, the nature of the case here for review must be considered. Colorado has not turned its back upon the condition to which it had consented. The court below held that the execution of that condition was not proper in this case since it had the effect of reducing what was determined to be a reasonable return. The Commission has not brought here the question whether that determination was correct or not. The only question here is whether the court below

to be imposed would be ineffective. This dissenter stated that he had serious question as to whether Colorado could be compelled to accept a confiscatory rate because of such condition.[7]

The certificate issued March 1, 1951. In its opinion issuing the certificate the Commission noted that the "future pattern" of Colorado's operations was settled and the rate case should proceed (R. 255-256, 10 F. P. C. 118). Accordingly on October 1, 1951 the hearings began on the rate case. On August 8, 1952, the Commission issued its order reducing Colorado's rates by $3,111,187 (R. 96-97). A part of this reduction was $878,202, which the Commission determined should be deducted from Colorado's cost of service. This was made up of $421,537 found by the Commission to be the loss on natural gasoline operations plus $456,665 of calculated income tax credit resulting from such asserted loss (R. 79, 127-128).

Colorado applied to the Commission for rehearing alleging, in relation to the natural gasoline question, that the Commission had not applied a method of allocating costs to this function which accorded with the condition and

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[7] The dissenting Commissioner stated:

> "These conditions, while devised to afford some protection to consumers against the natural consequences of the majority's action in approving the merger actually, in my opinion, have no such effect under the law. Should Colorado fail to earn a fair return in the future, the natural gasoline revenues given up to Southwestern cannot be treated as revenues of Colorado. They are gone forever. I question seriously whether the stockholders of Colorado can be compelled to accept a confiscatory rate of return simply because of a condition inserted in a certificate by the Federal Power Commission and accepted by their present Board of Directors. The present stockholders of Colorado, with the exception of Public Service, expect to distribute all of their holdings of Colorado's stock to the public as soon as the merger is consummated. The new stockholders will expect to be adequately compensated for their investment." (R. 311, note, 10 F. P. C. 133-134).

could make a decision at all—not whether the decision was correct. Colorado deems it entirely proper, therefore, to defend the right of the court below to consider the question. Otherwise this proceeding would be *ex parte*.[18]

*United States v. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952), cited by the Commission, favors Colorado. There, this Court decided that a mere procedural irregularity, non-prejudicial in effect, is waived if timely objection is not made. Where the irregularity is more fundamental, waiver need not apply. This Court stated:

> "The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity" (344 U. S. at 38).

It is evident that where more than a mere personal right of a party (see Justice Frankfurter's dissent, 344 U. S. at 39) is involved, waiver is not readily declared.

Here, there was more than a procedural irregularity or personal right. A reduction of a just return involves fundamental public rights bearing upon the Constitutional issue of confiscation. Indeed, waiver under such circum-

[18] Any rule of preclusion arising from the acceptance of a benefit (see Com. Brf., p. 23) has no relevancy here. As is pointed out herein, the public interest transcends the conscious acceptance of that which is against the public interest. The record shows that the Commission was moved by public need in granting the certificate—not advantage to Colorado divorced from such need.

that the factors of the allocation method were missing. In the rehearing application, specific point was made of the fact that the Commission's treatment amounted to a reduction in the rate of return. This came about from the fact that the calculated tax saving had the effect of reducing the return from 5.75% purported to be allowed to 5.01% (R. 98-103, 106-114).[8]

The application was denied on this question. If the Commission had allowed an income tax associated with the return purportedly allowed, Colorado would have been entitled to an additional $456,665 (R. 112-114). In denying this, the Commission said:

> "Colorado alleges that it has been deprived of the rate of return to which it is entitled by reason of our treatment of the loss on gasoline operations in computing income taxes. Colorado claims the federal income tax allowance is properly calculated at $642,264, whereas our allowance is $185,599, or a difference of $456,665.
>
> "The difference between the claimed income tax liability and the income tax allowance we provided is the result of our treatment of the loss on gasoline operations of $421,537. We have found that the loss on gasoline operations should not be considered a part of the cost of service and with this finding Colorado does not take issue. Colorado would have us compute its federal and state income tax liabilities on the basis of earnings which do not reflect a reduc-

[8] The deduction of the loss plus the tax saving reduced the rate of return to 4.19%. The cost of service, as found by the Commission, including return purported to be allowed at 5¾% without any gasoline loss and tax saving, was $15,844,469 but that actually allowed was $14,952,567 (R. 80). The difference is $891,902 (this includes $13,709 of state taxes not shown above, see Com. Ref., p. 6). The rate base allowed was $57,048,988 (R. 53) and the rate of return at 5¾% (R. 69) is $3,280,317 (R. 80). The actual return after deducting $891,902 is $2,388,415 which when divided by the rate base of $57,048,988 equals 4.19% instead of 5¾%.

this rate case. It is evident that both were hard fought cases.[15] Serious consideration of the issues must, therefore, be assumed. In the certificate case the rate implications were without question considered, including, as mentioned, the validity of the gasoline condition.

With these facts, it is evident that the policy of such limitations as those contained in Section 19(b) has been satisfied. This policy, as announced by this Court, is quoted by the Commission as follows:

> "The agency charged with administering the Act should have the opportunity to 'consider the matter, make its decision, and state the reasons for its action' (*Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 155; 'orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts' " (Com. Brf. pp. 31-32).

The announced salutary policy has been satisfied here through the interrelated certificate and rate proceedings and the express specific consideration in the former of the validity question.

### C. The nature of the question is excuse for failure to raise.

#### 1. The public interest.

The function of a "natural-gas company" is affected with a deep public interest. Section 1(a) of the Natural Gas Act so provides. The court below expressly recognized that important fact and upon the basis of it, refused to allow the reduction of a reasonable rate of return

[15] The majority of the Commission noted an adversary stand taken by its Staff. *In the Matter of Colorado Interstate Gas Company*, 10 F. P. C. 105, 106 (1951).

stances would appear to be totally immaterial. *Tucker*, therefore, supports what the court below did in this case.[17]

### 2. The fundamental importance of the issue.

The court below discovered and corrected substantial error leading to an unjust end result depriving Colorado of earning a fair return (R. 300). Under both the Constitution and the Natural Gas Act, it is apparent that rates set may not be unreasonable or confiscatory in their end result. *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 602, 603, 607 (1944).

The Commission does not seriously question that the substantive determination below was correct.[18] It is apparent that the court below would not permit the Commission to execute the condition in such a way as to give an illegal result. The court dealt with the Commission's power so to

[17] The Commission also cites *Helvering* v. *Wood*, 309 U. S. 344 (1940), and *United States, et al.* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774 (1945). These cases are clearly distinguishable.

In *Helvering*, the Commissioner attempted in the Supreme Court to base an argument on another section of the Internal Revenue Code which had not been previously injected, but on the contrary, there had been an express waiver of reliance upon any section other than that expressly mentioned. The Court put great reliance upon this express waiver and would not permit the argument to be made before it for the first time.

In *Hancock*, there had again been an express waiver but in this case it related to a restriction in a certificate of public convenience and necessity permitting the appellee to serve only freight forwarders. This Court put great emphasis upon the express waiver.

There was not involved in either case a fundamental public right or question which goes to the power of the administrative agency under the organic law.

[18] The Commission admits that this issue is not "strictly relevant" (Com. Brf. p. 36, note). The Commission asserts, however, that the condition's imposition was an appropriate "balancing of the investor and consumer interests" and therefore was fully consonant with the "end result" principle. It then cites an oversubscription of Colorado's stock. Suffice it to say, this oversubscription occurred four months before the rate determination (R. ex. 97). This isolated transaction certainly has no bearing whatso-

act. So considered, we may again turn to the language in the *Tucker* case to the effect where a matter goes to power or jurisdiction, a resulting determination can be set aside as a nullity, even in the absence of timely objection. Stated another way, since an administrative agency necessarily assumes the legality or constitutionality of its action, reasonable ground exists for not assigning as error action which is not within the Constitution or the agency's organic law. *Cf.* dictum in *American Power & Light Company* v. *Securities and Exchange Commission*, 141 F. 2d 606, 612-613 (1st Cir. 1944).

## III.

### The Court of Appeals did not upset the Commission's certificate determination in the merger case but merely exposed an error of law.

The Commission claims error for the further reason that what the court below did in effect left the merger outstanding without the condition, thereby infringing upon the Commission's administrative functions.[19] The leading case and that cited by the Commission on this point is *Federal Power Commission* v. *Idaho Power Company*, 344 U. S. 17 (1952). The *Idaho Power* case and the case at bar are not alike, and the former has no effect as precedent here. In the *Idaho Power* case the Commission issued a certificate of convenience and necessity and attached a condition which the Court of Appeals struck down, and in an amended judgment required the issuance of the certificate without the condition. This Court held that by the second judgment the Commission usurped an administrative function. In

[19] Colorado seriously doubts whether this issue is before the Court as being "fairly comprised" within the narrow question presented

the instant case, the Court of Appeals did nothing of the kind. It merely considered the condition and held that the execution of that condition could not be used as a device for reducing Colorado's return below that which had been found reasonable.

The court below did not exercise the authority of the Commission in a certificate matter, but merely laid bare an error of law fully consistent with the holdings of this Court. This was fully consistent with the pronouncements of this Court in the *Idaho Power* case. The court below left to the Commission whatever action or consequences may follow so far as the merger certificate is concerned. At least, in not going further than laying bare the error of law, the court left the Commission free to do whatever else was necessary. The court below did not tell the Commission what it should do as to the certificate. Therefore, the normal rule should apply that the judgment will be the basis of whatever action the Commission might take. *Federal Power Commission* v. *Pacific Power & Light Company*, 307 U. S. 156, 160 (1939).

The Commission argues that the court below did more than lay bare an error of law even in view of the fact that the remand to the Commission was merely to make an appropriate rate adjustment in accordance with the opinion. The court below did not attempt to determine the status of the merger certificate without the condition. The Commission admits, however, that a "superficial argument may perhaps be made that the *Idaho Power* line of cases supports the court's ruling rather than the Commission's position" (Com. Brf. p. 52). This argument is made on the basis that the court below was not acting on a review of the certificate order and, therefore, was without authority to direct reconsideration of that order. This argument, of course, overlooks the fact that the court below gave no such

direction. The court below did merely lay bare an error of law. The Commission can do whatever it is free to do under the Natural Gas Act if the condition was truly a condition to the granting of a certificate; presumably the condition has failed, and if the Commission is so inclined, it may consider that Colorado is operating without a certificate and it can bring whatever proceedings it deems necessary under the Natural Gas Act to enjoin such unauthorized operations.

The Commission's argument is very strained and tenuous on this point. The impression is given that the merger condition was a substantial reason for granting the certificate. Whether this is so, depends upon subjective considerations. The record shows, however, that the Commission awarded the certificate for specific recited reasons which, as the Commission said (*supra*, pp. 6-7), "demonstrate succinctly the desirability of the project laid before us for judgment". Among these were the low cost of the merger to Colorado with a possible resultant cash benefit; the aquisition by Colorado of legal title to valuable natural gas reserves; the acquisition of valuable reversionary rights; a simple corporate structure with resultant savings; that there would result a financially sound company able to finance present and future expansions to meet consumer needs; and that there was an imperative need for large additional deliveries of natural gas to meet primarily the needs of domestic customers which would be satisfied without unnecessary delay and "without any increase in present rates to the consumer". The Commission then concluded: "These, then, are the principal reasons which lead us to issue our certificate order of March 1, 1951. Viewing dispassionately all of the evidence in this case, we think that denial of the application would have been a distinct "s-

Additionally, it must be borne in mind that the Commission's own counsel argued the ineffectiveness of the condition as a means for reducing Colorado's return (R. 311-312, note). The Commission must have acted with this advice in mind and must be assumed to have acted with a view to the possibility that the condition would be declared invalid. One of the Commissioners dissented from the granting of the certificate and stated his serious question whether Colorado stockholders could be compelled to accept a confiscatory rate of return because of the condition (R. 311, 10 F. P. C. 133). It is apparent, therefore, that in their deliberations, the Commission must have been confronted by one of its own number with this possible invalidity.

It wasn't the operation of the condition which was the sole consideration, or even one of the recited considerations for granting the certificate when the Commission came to summarizing its conclusion. Significantly, one thing that did impress the Commission was the supply of additional service without any increase in "present rates". The case taken to the court below for review was not a rate increase but was a rate decrease case. It is difficult, therefore, to assume that the Commission would not have granted the certificate without the condition. If, however, it thinks the condition's removal has rescinded the certificate, it is free to act on that basis. The court has not told it otherwise, as was done in the *Idaho Power* case.

The Commission makes the additional point that the court below was not dealing merely with an error of law. The court below was dealing only with the question of whether a reduction of what is otherwise determined to be a reasonable rate of return is a proper function of the Commission under the Natural Gas Act. The court's determination in the substantive sense can mean no more

return is beyond the Commission's authority under the organic law. This is about as pure a legal conclusion as it would be possible for a court to come to in a rate review proceeding. Certainly, the court in such determination has not interfered with the responsibility centralized in the Commission of inquiring into the technical complexities of the rate determination. *See Bingham's Trust* v. *Commissioner of Internal Revenue*, 325 U. S. 365, 382 (Justice Frankfurter, concurring) (1945). Of course, even questions of law must arise from facts, for without facts there can be no question of law. It is apparent, however, that a determination of the sort made by the court below is as nearly a pure question of law as can arise from an administrative proceeding.

Further argument is made by the Commission that direct review of the certificate determination was possible —except for estoppel. The implication is that the action of the court below constitutes a collateral attack upon the certificate determination, in that the court below leaves the certificate standing without the condition and Colorado did not seek review of the certificate case. In the first place, collateral attack is not involved. *Res judicata* would not apply in this sort of administrative determination. *Niagara Mohawk Power Corporation* v. *Federal Power Commission*, 202 F. 2d 190, 198 (D. C. Cir. 1952) affirmed 347 U. S. 239 (1954). In addition, the condition involved here was a rate condition which did not immediately adversely affect Colorado. Colorado would be adversely affected only on the contingency of a future determination of loss in a rate case. Colorado contends that review under these circumstances is premature. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 130 (1939); *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591,

analogy to *Idaho Power* stating that the condition there was "in a sense" not immediately operative since the transmission lines which were to carry government power had not yet been constructed. The construction of physical facilities under a plan contemplated in a certificate proceeding certainly is considerably different from a future rate case wherein the condition might or might not be operative depending entirely upon whether the Commission concluded that there was or was not a calculated loss on the gasoline operations.

## IV.

### The Administrative Procedure Act justified the Court below in considering the question.

The court below took the position that it had inherent power *sua sponte* to note basic erroneous legal conclusions adduced from the established facts and cited in support of this power Section 10 of the Administrative Procedure Act. It was the court's view, in particular, that "To hold that we are precluded from considering the legality or constitutionality of the action of an administrative agency based upon facts found by it and unchallenged in the reviewing court would seem to make nugatory and meaningless these clear and positive mandates of the Section" (R. 301-302, 209 F. 2d 734).

The Commission contends that the Administrative Procedure Act does not affect the requirements of Section 19(b) of the Natural Gas Act (Com. Brf. pp. 40-48) and, therefore, the court below committed error. In its criticism of the court below, the Commission argues that the court failed to take adequate account of various phrases in Section 10 of the Administrative Procedure Act which the Commission considers "indicate that the Administrative Procedure Act

judicial review of issues not timely raised before the administrative agency" (Com. Brf. p. 46). Quite apart from the general position taken by the court below that the issue had been before the administrative agency and the court, it may be questioned whether the language relied on by the Commission supports the proposition contended for. For example, the primary reliance of the Commission is on the phrase in the introductory clause of Section 10 "which expressly makes Section 10 inapplicable where 'statutes preclude judicial review'" (Com. Brf. p. 45). Conceding that this introductory clause makes Section 10(e) inapplicable to a certain category of cases, it seems perfectly clear from the legislative history of the Act that the phraseology "statutes preclude judicial review" was not intended to refer to statutory provisions relating to the *scope* of judicial review of an administrative action which is subject to review.[20] There may well be room for doubt

[20] The report of the Senate Judiciary Committee on the bill which became the Administrative Procedure Act (S. Rep. No. 752, 79th Cong. 1st Sess., reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., pp. 185-231) makes the following comment on the phraseology "statutes preclude judicial review" in the introductory clause of Section 10:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn on the credit of some administrative officer or board." S. Doc. No. 248, p. 212.

The report of the House Judiciary Committee (H. Rep. No. 1980, 79th Cong. 2d Sess., reprinted in S. Doc. No. 248, 79th Cong. 2d Sess., pp. 233-291) contains exactly the same comment and adds several sentences which make it even clearer that the statutory provisions referred to in the introductory clause of Section 10 are those which entirely preclude any judicial review of the administrative action in question:

> "* * * To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute

as to the exact bounds of the phrase "statutes preclude judicial review", but *Heikkila* v. *Barber*, 345 U. S. 229 (1953), shows that the area of debate over the meaning of "statutes preclude judicial review" is not where the Commission suggests and, in particular, does not affect the applicability of Section 10 of the Administrative Procedure Act to the present case. The holding in *Heikkila* was that Section 10 of the Administrative Procedure Act does not apply to deportation proceedings under Section 19 of the Immigration Act of 1917, 39 Stat. 889, because Section 19 falls within the category of "statutes [which] preclude judicial review" even though deportation orders are subject to attack by writ of habeas corpus. The significance of *Heikkila* in relation to the present case would appear to lie not in the conclusion reached, which is not applicable, but in the recognition given to the general effect of Section 10 in expanding the scope of judicial review. After noting evidence in the legislative history of the Administrative Procedure Act that Congress intended the excepted category of "statutes [which] preclude judicial review" to be a narrow one, the Court commented:

> "* * * The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review * * *" 345 U. S. at 232.

The Commission relies, however, on the argument that "the legislative history of the Act shows that it was not designed to upset requirements such as that embodied in Section 19(b) of the Gas Act" (Com. Brf., p. 46). While this does not deny that the requirements in Section 19(b) should now be read *in the light of* the Administrative Procedure Act, it should also be noted that the particular items

of legislative history to which the Commission calls attention (Com. Brf., pp. 46-47) do not support its argument. The quotation from the Senate Committee Report (S. Doc. No. 248, 79th Cong., 2d Sess., p. 289, fn. 21, quoted at p. 47) relates to the doctrine of the exhaustion of administrative remedies, which is not here involved. The quoted statement by Senator McCarran (S. Doc. 248, 79th Cong., 2d Sess., p. 311, quoted at pp. 47-48) related to the proper interpretation of "statutes preclude judicial review" and was intended to refer only to statutory provisions which deny *any* judicial review. *See Heikkila* v. *Barber*, 345 U. S. 229, 237, 239-40 (dissenting opinion by Mr. Justice Frankfurter). The other statements referred to by the Commission (Com. Brf., pp. 46, n. 23, and 48) are also fully consistent with the interpretation here contended for.[21] Thus it appears that the Commission is in error in treating as wholly inapplicable to the present case the general injunctions to reviewing courts contained in the Administrative Procedure Act.[22]

A Court of Appeals is not limited as the Commission indicates. The reviewing court may hold unlawful and set

[21] Indeed, the statement by Representative Gwynne to which reference is made (Com. Brf., p. 48) appears to provide affirmative support for the contention that "statutes [which] preclude judicial review" are those which permit no judicial review at all:

> "* * * This bill does not give a court review in any case where review is now precluded by statute. It simply clarifies and expands in some particulars the authority of the court in reviewing cases in which court review is not precluded by law * * *." S. Doc. No. 248, pp. 374-75.

[22] The Commission argues that it is not in keeping with the design for the review of administrative orders to expand the record by appendices after decision in the Court of Appeals (Com. Brf., p. 40, note 19). The appendices referred to showed only the early genesis of the condition (R. 289, 322-325) or that the question of enforceability of the condition had been considered (R. 311-312, notes). The essentials of the condition itself, and the certificate opinions (R. order (R. 247-248), were made part of the rate case record during

aside fundamental action and conclusions not in accordance with law and in so doing the whole record is available to it for discovering fundamental error. In this regard, the provisions of Section 10 of the Administrative Procedure Act would appear to impose requirements of judicial review beyond the requirements of the Natural Gas Act. *Cf. Pittsburgh Steamship Company* v. *National Labor Relations Board*, 180 F. 2d 731, 736 (6th Cir. 1950).

The Commission relies strongly on a line of cases represented by the *National Labor Relations Board* v. *Cheney California Lumber Company*, 327 U. S. 385 (1946). The *Cheney* case and those like it can be safely contrasted with the situation at bar here. In *Cheney* it certainly appeared that the Labor Board determinations were entered almost completely on default. Here, however, Colorado had put to the Commission the question of reducing its rate of return. The contention of the Commission that a reviewing court is held within the narrowest possible limits where an administrative order is challenged, regardless of the enactment of the Administrative Procedure Act, was pretty well settled by this Court in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U. S. 498 (1951). There, this Court considered the effect of the Taft-Hartley Act and the Administrative Procedure Act upon a reviewing court's authority and stated (340 U. S. at 500): "The Court of Appeals has now held, in accordance with our own view, that the scope of review had been extended 'beyond the requirements of the Wagner Act' • • • and that in the light of the new requirements the record considered as a whole disentitled enforcement of the order."

Regardless of the authority of the court to consider the question without the benefit of the Administrative Procedure Act, it is apparent that the court's obligation to

consider the end result was expanded by the enactment of that legislation. The court did not depend entirely upon the Administrative Procedure Act to support it. It discharged a full judicial responsibility under all of the applicable law.

## Conclusion.

For the foregoing reasons, the judgment of the court below should be affirmed to the extent that it has refused to permit the deduction from the proper rate of return pursuant to the certificate condition under which the Commission excluded from the cost of service of Colorado the losses from gasoline operations and an associated income tax credit.

Respectfully submitted,

James Lawrence White,
William A. Dougherty,
John P. Akolt, Sr.,
John R. Turnquist,
Charles E. McGee,
Lewis M. Poe,
Counsel for
Colorado Interstate Gas Company

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## Appendix.

1. Section 19 of the Natural Gas Act (52 Stat. 821, 831, 15 U. S. C. (717r) provides in pertinent part:

> (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. * * * No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.
>
> (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *

2. Section 10 of the Administrative Procedure Act (60 Stat. 237, 243, 5 U. S. C. (1009)

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——

* * * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of the agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.